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IN THE

Supreme Court of the United States

October Term, 1966

No. 562

The Board of Supervisors of Prince Edward County, Virginia, and its constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right,

Petitioners,

v.

Cocheyse J. Griffin, Migon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Board of Supervisors of Prince Edward County, Virginia and its constituent members, namely, W. W.

Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, petitioners herein, pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled cause on the 20th day of June, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and along with the dissenting opinion is printed in Appendix A hereto pages 1 through 11.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on the 20th day of June, 1966, *infra,* Appendix, page 18. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Order staying the execution of a portion of the Order entered on June 20, 1966, until application to this Court for a writ of certiorari was issued on July 29, 1966, *infra,* Appendix, page 19.

QUESTIONS PRESENTED

I

Does 18 U.S.C. § 401 (3) deny jurisdiction to a Court of Appeals to find an appellee guilty of contempt for doing an act not forbidden by a "lawful writ, process, order, rule, decree, or command" of said Court where the appellant had given notice of appeal of a judgment of the district court refusing to enjoin the act done by the appellee but made no application for an Order preserving the status quo pending decision on appeal as provided by Federal Rules of Civil Procedure 62 (c), (g).

STATUTES INVOLVED

18 U.S.C. § 401. Power of Court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

Federal Rules of Civil Procedure 62 (c), (g)

* * *

(c) "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

* * *

(g) "Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to

suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

STATEMENT

The history of this litigation is set forth in the opinion of this Court. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 12 L ed 2nd 256, 84 Supreme Court 1226. The Court held that abstention was not appropriate under the facts of the case and reversed the United States Court of Appeals and affirmed the judgment of the United States District Court for the eastern district of Virginia which Court had previously held that tuition grants payable to parents under circumstances existing in Prince Edward County should be enjoined "so long as the public schools of the County remained closed." That the District Court could require the Board of Supervisors to levy the necessary taxes and appropriate the necessary money to give the children of Prince Edward County "the kind of education that is given in the State's public schools. (Appendix, page 20. Mandate of the Supreme Court of the United States dated May 25, 1964.)

On June 5, 1964 the District Court entered an Order requiring the School Board and the Board of Supervisors of Prince Edward County to report the plans made for reopening schools and whether necessary funds had been appropriated. The School Board reported its plans for opening schools. The Board of Supervisors advised the Court that necessary funds had not been appropriated and would not be appropriated prior to June 17, 1964.

On June 17, 1964 the District Court entered its Order directing the members of the Board of Supervisors on or before June 25, 1965 to "appropriate such County funds as are reasonably necessary for the opening and mainte-

nance of the public schools of Prince Edward County "on a non-discriminatory basis beginning with the Fall Term, 1964; and if necessary to so do, the said members of the Board of Supervisors acting as such, are directed to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination the public school system in Prince Edward County like that operated in other counties in Virginia." The Court continued the injunction previously entered restraining the payment of tuition grants to residents of Prince Edward County "so long as the public schools of the County remained closed." (Appendix page 21, *et sec.*)

On June 29, 1964 the plaintiffs filed a motion to amend the Order of June 17, 1964 in the following particulars:

1. To restrain the payment of tuition grants "for use in any school that discriminates in the admission and education of pupils on the basis of race and from paying or causing the payment of such scholarships to any such person for use at any such school."

2. To enjoin the School Board and Superintendent of Schools "from assigning teachers or other administrative personnel on the basis of race and color."

3. Requiring the Board of Supervisors of Prince Edward County "to appropriate such County funds as are reasonably necessary for the opening and maintaining of the public schools of Prince Edward County and for all of the children of said county of public school age on a racially non-discriminatory basis." (Appendix, page 25.)

On July 7, the plaintiffs filed a motion in the District Court for further relief praying for an injunction substantially in accord with its previous motion to alter and amend the judgment order of June 17. (Appendix page 25)

The Board of Supervisors of Prince Edward County filed written response to the motion to alter and amend the judgment order of June 17. (Appendix, page 26) The Board also reported its action in response to Order entered on June 17, 1964 in which it reported that it had levied taxes and appropriated funds which it deemed adequate for the operation of public schools in Prince Edward County on a racially non-discriminatory basis during the year 1964-65, a total sum of $418,200.00 being thus made available for the said school year. The report shows the appropriation to be in excess of the appropriation of any of seven counties of Virginia adjoining Prince Edward County on the basis of the amount per pupil in average daily attendance for the latest figures available.

The District Court heard these motions on July 9 and on that date denied the same for reasons stated in its Order. (Appendix, page 31) The plaintiffs filed notice of appeal on July 17, 1964 and subsequently on July 28 moved the Court to accelerate the appeal. (Appendix pages 33, 35)

The Chief Judge of the Court of Appeals through the Clerk of that court by contact with the office of the Attorney General of Virginia sought to obtain a stipulation that no tuition grants would be paid pending the appeal. This was done on August 4 and on the same date the Clerk of the Court of Appeals was advised that the Board of Supervisors would not make the stipulation. On August 5, 1964 the Board adopted a resolution authorizing the payment of tuition grants in the amount of $310.00 for children attending a private non-sectarian high school and in the amount of $290.00 for children attending a private non-sectarian elementary school, one-half to be paid on or before September 1, 1964, and one-half on or before January 1, 1965. During the night applications for these funds were

prepared and on the morning of August 5 checks were issued to parents applying therefor. On August 13, 1964 the appellants moved the Court of Appeals to cite the Board of Supervisors of Prince Edward County for contempt for its action in thus paying tuition grants under its local ordinance and under the state law. The Board of Supervisors of Prince Edward County responded to this motion in writing. (Appendix, page 42)

The case was combined with a similar case from Surry County, Virginia. (339 F 2nd 486) The Court remanded the case to the District Court with direction to enjoin the payment of tuition grants to parents sending their children to private segregated schools. The Court did not pass upon the contempt citation but directed the District Court to make inquiry into the facts surrounding the payments and to consider whether or not the action of the Board was a contempt of an Order entered by the District Court on July 9 by agreement of the parties permanently enjoining the payment of tuition grants for the school year 1963-64. The District Court after hearing the testimony of all witnesses offered made its finding of fact in Order entered May 17, 1965. (Appendix, page 45) Upon these facts in a 3 to 2 decision the Court of Appeals held that because the purpose of this action was to avoid the effect of a possible adverse decision this constituted the "resistance to its (this court's) lawful writ, process, order, rule, decree, or command." We do not believe the law supports the decision of the Court.

REASONS FOR GRANTING THIS WRIT

While there may be doubt that 18 U.S.C. § 401 restricts the power of the Supreme Court because that Court is created by the constitution itself, it is well established that this statute does limit the power of District Courts and of

Courts of Appeal to punish for contempt. These Courts are created by the powers vested in the Congress under the constitution and there can be no doubt that the Congress has the lawful power and authority to limit their jurisdiction.

Ex parte Robinson, 19 Wall (U.S.) 505, 22 L ed 205; *Nye* v. *U.S.,* 313 U.S. 33, 85 L ed 1172; *In The Matter of Michael,* 326 U.S. 224, 90 L ed 30; *RE McConnell,* 370 U.S. 230, 8 L ed 2d 434; *Green* v. *U.S.,* 356 U.S. 165, 2 L ed 2d 672.

ANALYSIS OF THE STATUTE

The former statute 28 U.S.C. § 385 was in the following language:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, *That such power to punish contempts shall not be construed to extend to any cases except* the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." (Emphasis added)

The present statute 18 U.S.C. § 401 provides a Court of the United States shall have "power to punish by fine or imprisonment, at its discretion, such contempt of its authority, *and none other,* as—"

* * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." (Emphasis added)

This section was enacted in 1948. The words limiting the power of the court in the former statute "such power to punish contempts shall not be construed to extend to any cases except * * *" would seem to have been clear enough, however, the language used in the 1948 statute is so direct, emphatic, and simple that it cannot possibly be misconstrued. Under it the Court shall have the power to punish such contempts of its authority as are defined in the three enumerated sub-divisions and *"none other."*

It is a fundamental rule of statutory construction that every clause, phrase and word of the statute must be considered of significance and that in arriving at the meaning of the statute the Court must give force and effect to every word and phrase used therein. It must be presumed that words and phrases used in a statute were intended to be used by the legislature and that the legislative body understood their meaning and used them in their ordinary and common meaning.

See 50 Am Jur Statute § 358, pp. 362, 363, 364.

See also 82 C.J.S. Statutes § 316 b, pp. 549 *et sequa.*

Applying these principles it must be presumed that the Congress used the words and *"none other"* in their usual and common meaning and by this simple, direct, and conclusive language intended to limit the power of the Federal Court to punish for contempt to the three classes of action defined under (1), (2), and (3), of § 401.

This court and the lower Federal Courts have consistently construed this statute as a strict limitation upon the power of the lower Federal Court to punishment for contempt. Most of the cases have dealt with a construction of

28 U.S.C. § 401 (1) in seeking to ascertain and define misbehavior of any person "in the presence" of the Court "or so near thereto as to obstruct the administration of justice."

Nye v. *U.S.* *supra. RE McConnell supra; Farese* v. *U.S.*, 209 F 2nd, 312.

These cases clearly show the strict construction of this statute which has been sanctioned by the decisions of this Court.

Other cases demonstrating the restraint with which this Court has sought to temper the exercise of the discretionary power to punish for contempt is demonstrated by such cases as *Cook* v. *U.S.*, 267 U.S. 517, 537, 69 L ed 767, 774 holding that the defendant is entitled to compulsory process and the assistance of counsel. *Gompers* v. *U.S.*, 233 U.S. 604, 611, 612, 58 L ed 1115, 1120 holding that the defendant is entitled to the benefit of the general statute of limitations governing crimes. See also *Morgan* v. *U.S.*, 95 Fed. 2nd 830.

THE NECESSITY THAT AN ORDER OF THE COURT BE IN EXISTENCE

The words used in the statute "disobedience or resistance to its lawful writ, process, order, rule, decree, or command" are words descriptive of a command, a direction or requirement of the Court and this command, direction or requirement of the court must be "lawful."

If there could be any possible ambiguity or uncertainty as to the meaning of the words used in § 401 (3) such ambiguity is certainly removed by the provisions of the immediately following section of the Code, 18 U.S.C. § 402 which provides:

"Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District Court of Columbia, by doing any act or thing *therein, or thereby forbidden,* if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any state in which the act was committeed, shall be prosecuted for such contempt as provided in § 3691 of this title and shall be punished by fine or imprisonment, or both."

* * *

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." (Emphasis added)

The language is further enlightened and clarified by the provision of 18 U.S.C. § 3691 which provides:

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States *by doing or omitting* any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any act of Congress or under the law of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by jury which shall conform so near as may be to the practice in other criminal cases."

> "This section shall not apply to contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice, not to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* in any suit, or action brought or prosecuted in the name of, or on behalf of the United States."

The trial court stated in its opinion "Obviously the aim was to thwart the impact of an adverse decree forthcoming on the appeal. In effect it was a resistance to its (this court's) lawful writ, process, order, rule, decree, or command. 18 U.S.C. § 401 (3)" (Appendix, page 6)

Thus the Court of Appeals recognizes and admits that no order was in effect or had been entered or issued which forbade the action of the Board of Supervisors, but nonetheless the Court held that because it might in the ultimate determination of the pending appeal enter an order forbidding the act which was done was sufficient to bring the act within the terms of § 401 (3). This cannot be true when we look at the language of § 402 and § 3691 for those sections define the disobedience and resistance mentioned in § 401 (3) as the doing of an act or thing thereby forbidden—that is forbidden (past tense) by the lawful writ, process, rule, decree, or command. Such language does not permit punishment for contempt for the doing of an act which may at some future time prospectively be "forbidden by the lawful writ, process, order, rule, decree, or command" of the Court.

The same is true of § 3691. The language of the last paragraph of § 3691 refers to "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* (past tense) in any suit or action brought or prosecuted in the name of, or on behalf of the United States." All of these statutes should be read to-

gether, the words used therein should be given their usual purport and meaning. Given such meaning they foreclose the possibility of a person being in contempt of an order which has not been entered nor indeed which the Court has even decided should be entered.

We also need to consider in connection with a proper construction of these statutes the Federal Rules of Civil Procedure. Rule 1 provides that the Federal Rules of Civil Procedure "govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity." Rule 62 (c) expressly directs the procedure to be followed in order to preserve the rights and equities of all parties pending a decision on appeal. If this rule governs procedure in this case then punishment for contempt for destroying the so called subject matter of the litigation is neither necessary nor permissible. For if Rule 62 (c) "govern the procedure" then contempt proceedings are not permissible until the court has entered such order as in its discretion is necessary and until such order has been violated. These rules were adopted by order of the Supreme Court entered on December 20, 1937. These rules have the effect of law and supersede inconsistent statutes. Barron and Holtzoff, Federal Practice and Procedure, Volume I § 136, p. 233. It appears that Rule 62 (c) supersedes those cases supporting the view that a court may find a judgment of contempt for destroying the subject matter where no order preserving the status quo has been entered. (Such as *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527 (1911) and *Lamb* v. *Cramer* (1932) 285 U.S. 217 relied upon in the majority opinion below.)

The appellant is not entitled to an injunction or a stay as a matter of right but the matter rests in the sound discretion of the court and an injunction or stay must be sup-

ported by an appropriate showing and finding. *U.S.* v. *El-O-Pathic Pharmacy,* 192 F. 2nd 62. *Vacuum Oil Co.* v. *Grabler Mfg. Co.,* 53 F. 2nd 975. See *Sawyer* v. *U.S. Steel Co.,* 197 F. 2nd 582. Frequently the courts have refused to grant the restraining order, injunction or stay requested pending appeal. *Jemenez* v. *Barber,* 252 F. 2nd 550. *Lapin* v. *La Maurine,* 11 F.R.D. 339. *Chapman* v. *El Paso Natural Gas Co.,* 192 F. 2nd 404. It was held that it is improper for the court to grant an injunction pending appeal from a decree denying the injunction in the absence of peculiar circumstances which so warrant. *Liberty National Bank of South Carolina* v. *McIntosh,* 16 F. 2nd 906. Certiorari dismissed. 273 U.S. 769.

The Court in *Green* v. *U.S.,* 356 U.S. 165, 2 L ed 2nd, 672, 681 was dealing with an order for the surrender of a defendant who had been convicted and his punishment fixed at a fine of $10,000.00 and five years imprisonment. We quote from that opinion.

> "In contrast to the judicial restrictions imposed on the contempt power exercisable under the clauses now found in subdivisions (1) and (2) of § 401, we find no case suggesting that sudivision (3) of § 401, before us here, is open to any but its obvious meaning. This clause also finds its statutory source in the Act of 1831, which first made explicit the authority of federal courts to punish for conduct of the kind involved in this case by providing that the contempt power should extend to '. . . disobedience or resistance . . . to any lawful writ, process, order, rule, decree, or command . . .' of a federal court."

The court held in *Terminal Railroad Association* v. *U.S.,* 266 U.S. 17, 29, 69 L ed 150, 155

> "In contempt proceedings for its enforcement a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read."

To the same effect see *Kelton* v. *U.S.* 294, Fed. 491, Certiorari denied, 264 U.S. 590, 68 L ed 864. See also *U.S.* v. *Hall,* 198 F 2nd 726. See *NLRB* v. *Express Publishing Co.,* 312 U.S. 426, 435, 85 L ed 930. See also *Traub* v. *U.S.,* 98 U.S. App. D.C. 43, 232 F 2nd 43, 47. See also *McFarland* v. *U.S.,* 295 F 648, 650. See also *NLRB* v. *Bell Gas & Oil Co.,* 98 F 2d 405, 406. See also *NLRB* v. *Bell Gas & Oil Co.,* 99 F 2d 56.

WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY THE LAW

The majority opinion of the 4th Circuit as Chief Judge Haynsworth so ably sets forth in his dissenting opinion is in conflict with prior decisions of the 4th Circuit. In *Ex parte Buskirk* 4th Cir. 72 F. 14, Buskirk had been guilty of contempt of an Order of the United States District Court of West Virginia. Buskirk was a defendant in an action of ejectment involving the title to real estate. Subsequently, a bill was filed alleging that the defendant, Buskirk, was preparing to cut and remove timber from the land in controversy in asking for an injunction. Subsequently, the complainant filed affidavits that Buskirk had violated a stipulation entered into in the cause and asked for a rule against him. Buskirk filed his answer stating (1) That no order had been entered in the case by way of injunction (2) That the so called stipulation was not in writing and

that no order with respect thereto existed (3) That the parties and their attorneys are in disagreement as to certain oral conversations between them and that in the absence of an order of the court Buskirk could not be adjudged in contempt. Thereafter the court undertook to enter an injunction against Buskirk nunc pro tunc. Subsequently an order was entered finding the defendant in contempt and imposing a fine against him and the defendant having refused to pay the fine and costs he was ordered to be committed to jail. The proceedings came to the 4th Circuit upon writ of habeas corpus. The court cited the provisions of the statutes then in effect limiting punishment for contempt to the conduct now defined and simplified under 18 U.S.C. §401 (1), (2), (3). The court cited *Ex parte Robinson, supra.* The court held that the nunc pro tunc order entered on June 28, 1895 was a complete nullity and void, that the defendant therefore did not act in violation of any lawful court order and should be discharged by writ of habeas corpus. The opinion of the Court of Appeals for the 4th Circuit is in complete conflict with the opinion in *Buskirk.* In fact at least in *Buskirk* there was an effort to make an order. In this case there was no semblance of an order and as heretofore pointed out at the time of the Board's act in paying tuition grants it was by no means certain that any adverse order or judgment would ever be made.

In *Atwell* v. *U.S.,* C.A. 4th Cir. (1908) 162 F. 97 the same statute was before that court under different facts. In this case a grand juror who sat in April 1905 and who had taken an oath of secrecy after he was discharged from grand jury service made a disclosure of occurrences during the deliberation of the grand jury. A rule was issued requiring Atwell's appearance to show cause why he should

not be punished for contempt in the disclosures. In reversing a conviction for contempt the Court of Appeals made the following statement:

> "While courts are vested by common law with inherent powers to protect themselves and enforce their mandates, there can be no question that this power may be limited by legislative authority, and it cannot be further questioned that this act of Congress has limited this power in federal courts to a greater extent than it has been limited by any other government where the common law prevails. While this is true, it must be conceded by all that this power cannot be absolutely destroyed without making the mandate of the courts mere idle and meaningless fulminations to be ridiculed and not respected. Mr. Justice Johnson, in Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242, while substantially deciding that the power to punish by contempt may be limited by legislation, has nevertheless very pertinently said:
>
> "The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences, if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state

as they arise. It is the science of experiment. But, if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interest and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbors' rights.'"

"The wisdom of these enunciations of sound morals and correct legal principles is accentuated with redoubled force under the conditions which exist to-day. The exercise of this discretion and power by the courts is not designed for evil, but for good; not for oppression, but for protection. Very frequently those who complain the loudest against its exercise are ultimately benefited the most. Men, inflamed by passion, are frequently not capable of rightly judging of their own conduct or of foreseeing the consequences thereof. In such cases the restraining power on the part of judges, acting under solemn obligations to do 'equal right to the poor and to the rich,' chastened and humbled by the sense of the weighty responsibilities laid upon them, may save such persons from liability to civil and criminal actions, calculated to bring to them ruin and loss of liberty. While these things are true, we, as judges, must never fail to remember the restraints which hedge about this discretion. The contempt proceedings must be regarded as in its nature of a criminal character, and the accused must be entitled to all reasonable doubt arising from the facts alleged to con-

stitute the contempt. He is guaranteed the right to appeal, and he may by the executive power be pardoned. This statute has been construed, and the limitations placed upon this power by it have been very clearly defined, by Mr. Justice Field in Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, wherein he says:

"'The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited by Act Cong. March 2, 1831, c. 99, 4 Stat. 487. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts expending or limiting their jurisdiction. The act of 1831, is, therefor, to them the law specifying the cases in which summary punishment for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on

> the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.' "

So that it is apparent that the majority opinion in this case is in complete conflict with at least two prior 4th Circuit decisions. *Berry* v. *Midtown Service Corp.*, CA 2nd Cir. (1939) 104 Fnd 107 was an action to recover damages for wrongful death which resulted in a judgment for the plaintiff which was entered of record. After the verdict was rendered counsel for the insurance carrier who represented the defendant asked for a stay of execution to allow time to consider an appeal. After discussion between the court and counsel a 20 day stay was granted. During this period the judgment debtor disposed of all of its assets and the plaintiff obtained an order requiring the transferer and transferees and their several officers to show cause why they should not be fined for a civil contempt. The court in its opinion refers to *Lamb* v. *Cramer, supra* and *Merrimack River Savings Bank* v. *Clay Center, supra* and other cases holding that a removal of the subject matter or its destruction pending an appeal may constitute a contempt. It then said:

> "But decisions such as these do not control the case at bar, since the present action was not concerned with any specific property; nor would an appeal be defeated or impaired by the judgment debtor's transfer of its assets after rendition of the money judgment. Hence contempt, if contempt there be, must turn on the final clause of the statute."

The court notes the decision of Judge Van Fleet in *Lineker* v. *Dillon,* 275 F. 460, D.C. N.D. Cal. whose opinion was in conflict with the opinion of the court in the case before it.

"Despite our respect for the views of Judge Van Fleet, we are unable to agree with his opinion that a stay directed to one party can be expanded by implication into an order upon the other. The authorities he cites do not extend so far. Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

In another case decided in the 2nd Circuit *RE Probst,* 205 F 512 (1913) an involuntary petition in bankruptcy was filed against Probst. Probst obtained from the Bankruptcy Court an order staying prosecution of an action pending against him in a state court. In applying for the stay he represented that he was in possession of all of the assets listed in his bankruptcy schedule and was holding them subject to the orders of the court. During the period of the stay he disposed of the assets and used the proceeds for his personal needs. The creditors sought a judgment againt him in contempt. The District Court entered a contempt judgment which the Court of Appeals reversed holding that Probst's conduct was neither misbehavior in the presence of the court nor was he an officer of the court and since there was no writ, process, order, rule, decree, or command of the court which his conduct violated he should not be convicted of the contempt.

In addition to *Lineker* v. *Dillon, supra,* there are several cases in other circuits which appear to be in conflict with the decisions above cited. These are *Raymor Ballroom Co.*

v. *Buck*, CA 1st Cir. (1940) 110 F 2d 207. *Dakota Corp.* v. *Slope County, North Dakota*, CA 8th Cir. 75 F 2nd 584. *Land* v. *Dollar*, CA D.C. (1951) 190 F 2nd 366. See also *In RE Sixth & Wisconsin Tower, Defenhorst* v. *Aitkin*, CA 7th Cir. (1939) 108 F2nd 538.

To lend further confusion to the legal situation there are a line of cases where an injunction was denied in the lower court to restrain the defendant from disposing of property or consummating merger contracts or like actions. The plaintiff in these cases filed notice of appeal, but failed to procure an order preserving the status quo pending the appeal. In each instance the defendant did the act sought to be enjoined, that is, made a transfer of the stock or other property which was the subject matter of the suit. In none of these cases was a rule for contempt issued and all of them were dismissed on appeal by the Court of Appeals involved. See *Fink* v. *Continental Foundry & Machine Co.* CA 7th Cir. 234 F. 2nd 465 Transfer of stock by corporate defendant in consummation of a merger agreement pending appeal. Dismissed upon the ground that there was nothing the Court of Appeals could do to restore the status quo. *Kelaghan* v. *Industrial Trust Co.* CA 1st Cir. (1954) 211 F. 2nd 134 Suit by stockholder to enjoin a corporation and its directors from carrying out the terms of proposed plan of consolidation with another banking corporation. Notice of Appeal was filed by plaintiff but no order to preserve the status quo pending the appeal. Appeal dismissed as moot. *Brill* v. *General Industrial Enterprises* (1956) CA 3rd Cir. 234 F. 2nd 465. Stockholders derivative suit to enjoin sale of the corporation's assets upon the ground that the sale would violate the antitrust laws. Notice of appeal given, transfer was consummated and suit was dismissed. In this case the court said:

"It is well-settled that the mere filing of an appeal in the absence of a stay of proceedings, cannot operate as an injunction where none has been granted by the court below; otherwise stated, an appeal from a decree dismissing a complaint seeking an injunction, or refusing to grant an injunction, will not disturb the operative effect of such a decree, and where the act sought to be restrained has been performed, the appellate courts will deny review on the ground of mootness. Mills v. Green, 1895, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293; Jones v. Montague, 1904, 194 U.S. 147, 24 S.Ct. 611, 48 L.Ed 913; Selden v. Montague, 1904, 194 U.S. 153, 24 S.Ct. 613, 48 L.Ed. 915; Richardson v. McChesney, 1910, 218 U.S. 487, 31 S.Ct. 43, 54 L.Ed. 1121; Shaw v. Lane, 1917, 47 App. D.C. 170, 173, appeal dismissed sub nom. Shaw v. Payne, 1920, 254 U.S. 609, 41 S.Ct. 60, 65, L.Ed. 436; Chesapeake Western Ry. v. Jardine, 1925, 56 App. D.C. 33, 8 F. 2d 194, certiorari denied sub nom. Town of Bridgewater v. Jardine, 1926, 270 U.S. 653, 46 S.Ct. 352, 70 L.Ed. 782; California Canning Peach Growers v. Myers, 9 Cir., 1935, 78 F. 2d 194, 195."

"What was said in *Shaw* v. *Lane, supra* is particularly appropriate. There an appeal was dismissed where it sought to review the District Court's dismissal of a bill for an injunction to restrain the Secretary of the Interior from approving and delivering certain mineral leases of property belonging to an Indian tribe, it appearing that pending the appeal the leases had in fact been approved and delivered.

"Said the Court, 47 App. D.C. at pages 173-174:

" 'This is a clear case, where appellants applied to the court for a restraining order, which was denied, and no stay of proceedings was had pending appeal. The rule is without exception that, where appeal is taken from a decree dismissing a bill for injunction, and pending appeal the act sought to be restrained is done, the appeal will not operate as a stay of proceedings.

> The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect. Hovey v. McDonald, 109 U.S. 150, 161, 3 S.Ct. 136, 27 L.Ed. 888; In re Slaughterhouse Cases, 10 Wall. 273, 297, 19 L.Ed. 915; Leonard v. Ozark Land Co., 115 U.S. 465, 468, 6 S.Ct. 127, 29 L.Ed. 445. When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. A fortiori, the mere prosecution of an appeal cannot operate as an injunction where none has been granted. Knox County v. Harshman, 132 U.S. 14, 10 S.Ct. 8, 33 L.Ed. 249.'"

These decisions especially those decisions of this court cited in the quotation from *Brill* v. *General Industrial Enterprises* are in conflict with the majority opinion of the lower court and appear to be in conflict with the opinion of this court in *Lamb* v. *Cramer, supra,* and possibly *Merrimack Savings Bank* v. *Clay Center, supra.* These last two cases may be distinguished from the present case as suggested in the dissenting opinion of Chief Judge Haynsworth but this does not remove the conflict with the line of cases immediately referred to.

The lower court emphasized the language contained in the opinion in *Merrimack Savings Bank* v. *Clay Center*

> "This we need not decide, *since irrespective of any such injunction actually issued the willful removal beyond reach of the court of appeal . . . is, in and of itself, a contempt of this court . . .*" (Emphasis that of the Court of Appeals)

Incidentally the *Merrimack* case involved the destruction of utility poles and wires which action was sought to be enjoined. It is apparent that the destruction involved did

actually put it beyond the power of the court to grant an effecive injunction against such destruction. The same is true of *Lamb* v. *Cramer* which involved a suit to set aside a fraudulent conveyance, the property having been transferred beyond the reach of the court pending appeal. The present case is not a suit to reach or to deal with specific *property* but rather a suit to have adjudicated the *right* of the Board to expend public revenue as required and permitted by the law in Virginia. The payment of the tuition grants did not impair the power or jurisdiction of the court to decide the issue and to issue its injunction which in fact became effective to restrain future action. So that, tested by the standard laid down in *Merrimack* and *Lamb* the subject matter of the present suit was not specific property but rather to adjudicate the legal right of the Board to expend money. The court's jurisdiction on appeal was not defeated for the injunction sought was actually granted.

PRIOR HISTORY OF THE EFFORTS OF THE PLAINTIFFS TO PROCURE AN INJUNCTION AGAINST ALL TUITION GRANTS IN PRINCE EDWARD COUNTY

The injunction directed by the Court of Appeals 339 F. 2nd 486, 493 was:

> "Enjoining the defendants from processing or paying tuition grants to parents desiring to send their children to the foundation schools as long as those schools remain segregated, or to any other segregated school that is, in effect, an extension of the public school system."

The same injunction was sought by the plaintiffs in the district court when their amended supplemental complaint was filed. It was denied in the district court and instead

the court enjoined the payment of tuition grants "so long as the public school remained closed." 207 F. Supp. 349. On appeal to the 4th Circuit the refusal of the district court to grant the broader injunction was assigned as error. The Court of Appeals refused any injunction and held that the district court should have abstained from deciding the issues pending interpretation of state law. *Griffin* v. *State Board of Education,* 322 Fed. 2nd 332 C.A. 4th Circuit 1963. This court granted certiorari and its opinion is reported. 377 U.S. 218, S.Ct. 1226, 12 L.Ed 2d 256. Error was assigned in this court for failure of the district court to grant the broad injunction. Both the appellants and the appellees briefed the question on that appeal. The Solicitor General of the United States expressed the view that the court should not grant this broad injunction. This court affirmed the judgment of the district court and remanded the case for the entry of an order enjoining the payment of tuition grants "so long as the public schools remain closed" and requiring the Board and its individual members to levy taxes to raise funds adequate to operate the public school system in Prince Edward County like that operated in other counties in Virginia. The District Judge entered an order exactly in accord with the mandate of this court. The case was in this posture when the plaintiffs filed their motion to amend and alter the order and subsequently their motion for further relief asking for the broad injunction which this court had in effect refused to issue. The district judge believing that such an injunction should be the subject of a different suit refused to grant the injunction. The Court of Appeals reversed and the injunction was awarded and entered. (Other counties and cities in Virginia are controlled by a different injunction. See *Griffin* v. *State Board of Education,* 239 F. Supp. 560, 566)

This history of this litigation is recited here because it supports the good faith of the Board of Supervisors. Its action was consistent with its lawful rights. Certainly in the light of this long history of refusal of the injunction sought, in the light of the requirements of Rule 62 (c) for the issuance of an injunction or other order to maintain the status quo and in the light of the simple and we submit controlling provisions, 18 U.S.C. § 401 (3), there is absolutely no legal basis upon which to support the jurisdictional power or authority of the Court of Appeals in its judgment of contempt against the Board and its individual members.

CONCLUSION

It makes no difference what one may think of the propriety, the appropriateness or even the morality of the actions taken by the Board. These considerations are wholly irrelevant unless the law authorizes the judgment rendered.

It is essential that this awesome power of the court be defined and the legal confusion which is apparent from the conflicting decisions of the lower courts, some of which are in conflict with the express decisions of this court, should be clarified and resolved. This cannot be done save by the granting of the writ here prayed.

Respectfully submitted,

J. Segar Gravatt
Blackstone, Virginia
Special Counsel

Wm. F. Watkins, Jr.
Farmville, Virginia
Commonwealth Attorney
of Prince Edward County

CERTIFICATE

I, J. Segar Gravatt, a member of the bar of the Supreme Court of the United States and counsel for the Board of Supervisors of Prince Edward County, Virginia, and its individual members in the above captioned matter being a Citation for Contempt upon Motion of Cocheyse J. Griffin, et als., etc., against said Board and its individual members do hereby certify that copies of the Petition for Certiorari and Appendix have been served upon counsel of record for the adverse parties and upon counsel representing all other parties in the Court below by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of September 1966, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States as follows: S. W. Tucker, Esq. and Henry L. Marsh, III, Esq., 214 East Clay Street, Richmond, Virginia 23219, Attorneys for the adverse parties and the following attorneys for other parties in the Court below: John F. Kay, Esq., 1200 Ross Building, Richmond, Virginia, Robert Y. Button, Attorney General of Virginia, State Library Building, Richmond, Virginia, R. D. McIlwaine, III, Esq., Assistant Attorney General of Virginia, C. F. Hicks, Esq., Gloucester, Virginia, Frederick T. Gray, Esq., State-Planters Bank Building, Richmond, Virginia.

Given this 17th day of September 1966.

J. SEGAR GRAVATT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 562

The Board of Supervisors of Prince Edward County, Virginia, and its ~~contingent~~ constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right,

Petitioners,

v.

Cocheyse J. Griffin, Migon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. Segar Gravatt
Blackstone, Virginia
Special Counsel

Wm. F. Watkins, Jr.
Farmville, Virginia
Commonwealth Attorney of Prince Edward County

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I

Majority Opinion of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

ALBERT V. BRYAN, *Circuit Judge:*

A judgment of civil contempt upon the Board of Supervisors of Prince Edward County and its members is moved for by the appellants-plaintiffs. The ground of the motion is that the Board disbursed public funds to private segregated schools while the right to do so was under consideration by this court. A remedial order requiring the Board to restore these moneys to the County Treasurer is also asked. We grant the motion.

The episode developed in the enforcement of decrees of the District Court reopening the Prince Edward County public schools. The history of the litigation is laid out, ab ovo usque ad mala, in *Griffin* v. *County School Board,* 377 U.S. 218, 224 (1964). There the facts of the present controversy are related, commencing with the District Court's injunction dated November 16, 1961. This injunction was issued on the supplemental complaint of the Negro children and parents who were plaintiffs in the District Court and are the appellants here.

Specifically, the injunction commanded the Board and the State not to pay out further funds in tuition grants while the public schools of Prince Edward County remained closed. *Allen* v. *County School Board,* 198 F. Supp. 497, 503-504 (E.D. Va. August 25, 1961). The grants had been used for the support of Prince Edward County Educational Foundation, a privately organized corporation conducting a school for white children only. The Court refrained at the time from passing on the County's right to refuse to operate its public schools until the question could be ruled on by the State courts.

With no ruling in the State courts by the summer of 1962, the District Court resumed consideration of the issue, ordered the schools reopened and continued the injunction of tuition grants until the schools were reopened. *Allen* v. *County School Board*, 207 F. Supp. 349 (E.D. Va. July 25, 1962). On appeal this decree was stayed by the Court of Appeals awaiting decision in a case then pending in the Supreme Court of Appeals of Virginia. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (4 Cir. 1963). The abstention order was reversed in *Griffin* v. *County School Board*, *supra*, 377 U.S. 218, and the injunction and reopening orders of the District Court approved. Upon receipt of the mandate, the District Court set a hearing for June 17, 1964 to formulate a decree thereon.

This hearing resulted in an order to Prince Edward's Board of Supervisors to appropriate by June 25, 1964, such moneys as were reasonably necessary to open and maintain the public schools on a nondiscriminatory basis, beginning with the 1964 fall term. In obedience the Board arranged to open the public schools, voted appropriations for them and voted also a larger sum for 1964-65 session tuition grants. On June 29, 1964 the plaintiffs moved the District Court to enjoin permanently the processing of tuition grants and to require the Board to augment the sums available for public schools.

With the schools now open, on July 1, 1964 the State Board of Education authorized the reimbursement of persons, to the extent of the tuition grants enjoined for the 1963-64 session, for the amounts they had paid for their children's school attendance in private schools during that session. Thereupon, plaintiffs obtained a temporary injunction barring the payment retroactively of any tuition grants until the hearing on the motion for the permanent injunction, then set for July 9, 1964. The Board agreed to a

permanent injunction of the proposed reimbursement of 1963-64 grants. However, the Court declined to enjoin *future* grants and an appeal was noted on July 17, 1964 to this refusal. On July 28, 1964 the appellants moved this court to accelerate the appeal.

As we were then not in session, the Chief Judge requested the Clerk to ask the Board of Supervisors to stipulate that no tuition grants would be paid pending the appeal. On August 4, 1964 the Clerk transmitted this message to the office of the Attorney General of Virginia. In reply the Clerk was told "during the late evening of August 4," that the Board would not make the stipulation. The next morning the Clerk explained that a satisfactory stipulation would be an agreement that the grants would not be paid before the normal time for processing and paying grants, that is not until after the private schools opened in September 1964.

Meanwhile, during the night of August 4 and early morning of August 5, 1964 the Board met and decided to enlarge substantially the tuition grants for the session 1964-65, and ordered that payment of one-half of the total grants be made before September 1, 1964. That night white parents were notified of the Board's action. Checks totalling about $180,000 were distributed before 9 o'clock A.M. and most of them cashed at that hour, August 5, 1964.

On August 13, 1964 in their appeal, the appellants moved to cite the Board for contempt of this court and for an order restoring the money distributed during the night and morning of August 4-5, 1964. After argument of the appeal in regular course, the District Court was directed to enjoin the Board from paying any tuition grants to send children to private schools so long as these schools remained segregated. *Griffin v. Board of Supervisors*, 339 F.2d 486, 493 (4 Cir. December 2, 1964).

Our decision did not pass upon the contempt motion, but remanded it to the District Court for "further inquiries into the facts surrounding the payments." The District Judge was authorized to consider the charge of the appellants that the defendants had in effect paid 1963-64 grants retrospectively, by authorizing and paying increased amounts for 1964-65, and thus were in contempt of the District Judge's order of July 9, 1964.

Pursuant to the remittitur, the District Court on February 8, 1965 cited the individual members of the Board of Supervisors to show cause, if any, why they should not be held in contempt of the District Court for failure to comply with its injunction of July 9, 1964 against the retroactive payment of the 1963-64 grants. The rule came on for hearing April 23, 1965, at which time all of the parties in interest were present in person and represented by counsel. In addition to the facts heretofore recited, the District Judge made the following undisputed findings in regard to the questioned events of July and August 1964:

> "The Board of Supervisors of Prince Edward County held a meeting on the morning of August 4, 1964 at which time Warren Scott and four of the Negro citizens appeared and filed an unsigned petition bearing ten hundred four typewritten names requesting that the Board of Supervisors allocate additional funds to be used for the purpose of public education. No action was then taken.
>
> "Shortly after adjournment of the Board meeting, Supervisor Jenkins and Supervisor Steck met with a Mr. Taylor and other interested citizens for the purpose of finding a way to pay the '64-'65 tuition grants prior to the time the Court of Appeals could enter an order staying these payments. (It was then known to Mr. Jenkins and to the other members of the group that there had been discussions between Mr. Gray

[counsel for the State Superintendent of Public Instruction] and Mr. Dean [Clerk of the Court of Appeals] in re the possibility of the County agreeing not to make any tuition grant payments during the pendency of the appeal.)

"The Commonwealth Attorney and two other members of the Board of Supervisors were then called. Those assembled agreed that if the Board of Supervisors would increase the tuition grants to $310.00 for high school and $290.00 for elementary school and authorize the immediate payment thereof, this could be done before the Court of Appeals could do anything about it.

"The four Board members and the Commonwealth Attorney then went to the home of the chairman of the Board of Supervisors to advise him of what they had in mind and to determine whether or not a special meeting of the Board of Supervisors could be called the next morning for the purpose of expediting the payment of the '64-'65 tuition grants. The chairman, after being advised by the Board's special counsel* and the Commonwealth Attorney that such a resolution on the part of the Board of Supervisors would be legal, called a special meeting of the Board for 8:00 a.m. August 5th. At that meeting the Board passed the resolution which provided that the grants should be paid half on or before September 1, 1964 and half on or before January 1, 1965.

"In the interim, that is, between the meeting at Chairman Vaughan's house and eight o'clock the next morning, Board Member Jenkins and other members of the citizens' committee made arrangements to telephone the parents of the children then attending the Prince Edward School Foundation schools advising them if they came down that night and made application they could get half the tuition money that morning.

"Some twenty or thirty volunteers assisted the secretary of the Board in processing the applications and

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* The appellants note in their brief that Mr. Gravatt, the Special Counsel for the Board, in fact requested the Board not to pay the grants.

making out the necessary checks. County bonds were sold in Richmond the next morning to raise the money necessary for the payment of these checks.

"Twelve hundred seventeen tuition grant applications were filed during the night of August 4-5. All of these applications were for the '64-'65 school year. Each applicant was paid one-half of the amount applied for. Most, if not all, of the applicants were children enrolled in the Prince Edward School Foundation schools for the year '64-'65.

"There being no evidence that the money thus paid covered school years prior to '64-'65, the Court concludes that the payments made August 4-5, 1964 were not violative of the order entered herein July 9, 1964. The show cause order issued against the members of the Board of Supervisors February 8, 1965 will be dismissed, and it is So ORDERED."

That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. In doing so the Board took upon itself to decide its right to exercise, in favor of the private school, the Board's general power to appropriate public funds. This use of power was, as the Board was acutely aware, an arrogation of this court's responsibility. Obviously, the aim was to thwart the impact of any adverse decree which might ultimately be forthcoming on the appeal. In effect it was a "resistance to its [this court's] lawful writ, process, order, rule, decree, or command." 18 USC 401(3). The authorities are quite clear on the point.

The Board would escape the judgment of contempt on the argument that the statute limits the power of the court to violations of orders or decrees then extant. But precedent does not so contract the statute or constrict its intent. Although this court had not issued an injunction against the

appropriation of the moneys to tuition grants, the Board knew that if the plaintiffs succeeded this would be its ultimate decree, as in fact it became. That potential decree was thus then within the statute. Furthermore, the appeal was itself a "process" which was alive at the time of the disbursement and was resisted by the disbursement.

In *Merrimack River Savings Bank* v. *Clay Center,* 219 U.S. 527 (1911), a temporary injunction had been issued by a Federal District Court to prevent the destruction by a municipality of a public utility's poles and wires, located in the city streets under an authorized franchise. The suit was dismissed on jurisdictional grounds. However, for and during an appeal to the Supreme Court, the injunction was continued in force. On this review the dismissal was upheld. But before the mandate of dismissal had been issued or could issue, and in the period allowed for presenting an application for a rehearing, the city cut down the poles, destroyed a large section of the wires and thus put the utility out of business. This conduct was declared to be contempt of the Supreme Court, Justice Lurton saying at 535-536:

> "It does not necessarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since *irrespective of any such injunction actually issued the willful removal beyond reach of the court of the subject-matter of the litigation . . .* [on] *appeal . . . is, in and of itself, a contempt of the appellate jurisdiction of this court. . . .* Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent." (Accent added.)

The contempt power declared in the *Merrimack* case was not suggested to be rooted in the inherent power of the Supreme Court rather than in the statute now embodied in 18 USC 401(3). Incidentally, the Court has never excluded itself from the statute. Cf. Ex parte Robinson, 86 U.S. 505, 509 (1873). But *Merrimack* is not now cited to power. It is cited as warranting our finding that the putting of the subject-matter of this litigation beyond our reach was a defiance of this court, an anticipatory resistance to its ultimate orders or process.

That inferior courts have the same contempt power as the Supreme Court exerted in *Merrimack,* and that similar conduct is contempt of the lower courts, were unequivocally enunciated in *Lamb* v. *Cramer,* 285 U.S. 217, 219 (1932). There, as in the case now on review, no injunction or order had been issued restraining disposition of the property in suit. Nevertheless, receipt and possession of a part of the res, pendente lite, by a transferee of the defendant-owner was adjudged a contempt of the trial court. The Court had no difficulty in concluding that there was contempt despite the absence of a current restraining order.

While *Lamb* v. *Cramer, supra,* did not specifically mention the statute, the Court obviously did not think it barred prosecution of the transferee for contempt. Essentially, the Court followed the statutory terms—"resistance to its [the court's] lawful writ, process, order, rule, decree, or command"—by not limiting its application to an immediately outstanding precept. The anticipated final judgment was not considered to be presently beyond the contemplation of the statute. Indeed, the contrary is implicit in the opinion. The diversion of the res was held to be contumacious because it "tended to defeat any *decree* which the court *might ultimately* make in the cause." (Accent added.)

Civil and not criminal contempt was the gravamen of *Lamb* v. *Cramer* and is here too. This was a predominant

consideration of the Supreme Court and probably accounts for no advertence to the contempt statute, which seems worded more appropriately for criminal contempt. The omission means nothing, for the primary reasoning of the Court was that the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court. Whether the decision in *Lamb* v. *Cramer* was founded on this conception of judicial custody or on the statute, of which the Court was hardly unaware, is immaterial. Either ground supports our holding that the Board of Supervisors was in contempt.

The present case is quite different factually from *Berry* v. *Midtown Service Corp.*, 104 F.2d 107 (2 Cir. 1939), relied upon by the Board. There the subject-matter disposed of pending appeal was the leviable assets of the judgment debtor-appellant. The Court distinguished that case from ours when it said that the appeal was not "defeated or impaired" by the defendant's assignment. Further distinction is found in its observation that the suit "was not concerned with any specific property," the judgment on appeal merely establishing a general, personal, financial liability.

In our case the disbursement of the moneys seriously impaired the appeal. The suit and the appeal were directed to a specific subject, the Board's right to apply to a certain purpose moneys within its power. The Board assumed the right in utter and wilful disregard of this court's views. As was said in *Merrimack River Savings Bank* v. *Clay Center, supra,* 219 U.S. 527, 535, and again in *Lamb* v. *Cramer, supra,* 285 U.S. 217, such conduct constituted contempt although not formally and explicitly under injunction.

We find the Board of Supervisors and its members guilty of civil contempt. Accordingly, the Board and its constituent individuals, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, will be ordered

jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions of August 4-5, 1964. This cause will be continued for a period of 90 days from this date for report by the Board and its members of what has been done towards compliance with this order, as well as for the passage of such further orders as may appear proper.

Another matter on this appeal is the amount allowed appellants' counsel as fees for their services in litigation leading to the reopening of the public schools of Prince Edward County. The District Court fixed the fee at $7,500 and directed that it be paid in the proportions of 50% by the Board of Supervisors of Prince Edward County, 25% by the County School Board and 25% by the State Board of Education. The amount of an allowance of this kind is within the discretion of the District Court, and we would not feel warranted in reviewing it save for a misapprehension of the Court in arriving at its figure.

The District Judge stated that he would not award a larger amount because counsel had not followed the Court's suggestion to seek a ruling by the Supreme Court of Appeals of Virginia upon the basic question of whether the County had the right to abandon public schools to avoid the "racial discrimination prohibited by the Fourteenth Amendment." *Brown* v. *Board of Education,* 347 U.S. 483 (1954). On the assurance of counsel that such a suit would be filed, the District Court abstained, as we have noted ante, for a year from itself passing on the issue. But the question was not submitted to the Virginia court. Indeed, in the suit which they did institute in the State court, the petitioners, appellants here, disavowed the existence of any Federal question at all. *Griffin* v. *Board of Supervisors,* 203 Va. 321, 124 S.E.2d 227 (1962); *Allen* v. *County School Board, supra,* 207 F. Supp. 349, 350.

In their request for allowances, counsel did not include their services or their expenses in the State action. The reason for not tendering the Federal question to the State court, they now say, was that they believed a review on certiorari to the United States Supreme Court, should the State court's determination be unfavorable, would not be "an adequate substitute" for a District Court decision with permissible appeals. Cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964). We cannot think that counsel had this different course in mind when they assured the District Court of their intention to pursue their remedies in the State tribunal.

The omission was quite understandably disturbing to the District Judge. However, in the circumstances we do not think counsel should have been penalized by diminution of the award to them. Consequently, we will ask the District Judge to reappraise the value of the legal services without consideration of the reduction factor just discussed. Whatever the ultimate award, we think it ought to be assessed jointly and severally against all defendants, with leave to them to make such division of liability inter se as they deem equitable.

Order accordingly.

II

Dissenting Opinion of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

With whom Boreman, Circuit Judge, joins, HAYNSWORTH, Chief Judge, dissenting:

I find no fault with the decision of my brothers concerning the award of fees for counsel, and I am not in disagreement that the conduct of the Supervisors was unconscionable. However, I must disagree with the majority in their

interpretation of the power of this Court to adjudge parties in contempt.

It is clear that this Court has an inherent power to punish contempts. It was originally defined by the seventeenth section of the Judiciary Act of 1789 as the power to punish by fine or imprisonment all contempts of authority in any cause or hearing before the Court. But the power has since been limited and redefined by the Act of Congress of March 2, 1831, now 18 USC § 401. The statute prescribes:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Considerable doubt was expressed in Ex parte Robinson, 86 U.S. 505, as to whether this statute could limit the contempt power of the Supreme Court, which derives its existence and powers from the Constitution, and it is obvious from *Merrimack*[1] that the Court has since gone beyond the statute. But *Robinson*[2] made it clear that there can be no question about the limiting effect the statute has upon the courts of appeals and the district courts. As courts created, not by the Constitution, but, through the power that document vested in Congress, exercise of their inherent contempt powers must be confined to the bounds that Congress has fixed.

Measuring the facts in the present case by the word of

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[1] Merrimack River Savings Bank v. Clay Center, 219 U.S. 527.

[2] Ex parte Robinson, 86 U.S. 505.

Congress, I am unable to find a basis in the statute for a contempt citation here. Phrases (1) and (2) of the statute are not applicable here. The majority finds, under phrase (3), that there was disobedience or resistance to a lawful writ, process, order, rule, decree, or command of this Court. Yet none in fact existed to be disobeyed or resisted. The plaintiffs sought no temporary restraining order or injunction, and none was issued preventing the action taken by the Supervisors. The stipulation requested of the defendants by this court cannot be expanded to fit into any of the things specified in § 401 (3).

The word "process," as used in the statute in its context of writs, orders and decrees, obviously means more than the pendency of an appeal or of some other relevant judicial proceeding. It has been traditionally used to encompass such things as a summons, a subpoena, an attachment, a warrant, a mandate, a levy and, generically, other writs and orders. In the context of other orders and writs, "process" can reasonably be understood to mean no more than the sum of more explicit terms, such as "original process," "summary process," "mesne process" and "final process," all of which clearly refer to papers issuing from the court and embodying its commands or judgments, or notice of them. Construed so expansively as the majority's suggestion of equivalence with the pendency of any relevant judicial proceeding, it would entirely contravene the clearly limiting purpose of the congressional act.

Since the suggested construction of the word "process," as used in the statute, is original with the majority, it has never been treated in any reported opinion. The suggestion is inconsistent with the substantially uniform course of decision, however, while the primary theory of the majority is explicitly at odds with the precedents in this and other courts.

This court declared itself in Ex parte Buskirk, 4 Cir., 72 Fed. 14. There it was held not only that an anticipatory, partial avoidance of a potential decree was not a punishable contempt within the confines of the limiting statute; violation of a stipulation made in open court, without which mesne process might, and probably would, have issued, was held not to be. Implicit in the decision is a narrow, literal reading of the word "process."

Buskirk was a party in a judicial proceeding in a district court for a determination of the ownership of a tract of timber. In open court, he entered into a stipulation that none of the timber would be cut until the court had decided the question of ownership. Nevertheless, pending the court's decision, he began cutting the timber and intentionally removed it beyond the reach of the court. This court held, because of the statute, "however reprehensible such conduct * * * may have been * * * it nevertheless did not constitute a contempt to the court or its orders."

My brothers now overrule *Buskirk* without deigning to mention it.

Our own decision in *Buskirk* is not an aberration. It is the exemplar of uniform decision. Four of our sister circuits have embraced the same construction of the statute, and have done so in no uncertain terms.[3] No court of appeals, until now, has toyed with any other reading.

I cannot dismiss all of these holdings on the basis of an asserted distinction of the Second Circuit's decision in *Berry*. The basis of the asserted distinction of *Berry* was not present in the Second Circuit's earlier *Probst* decision, upon which

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[3] Parker v. United States, 1 Cir., 126 F.2d 370, 380; In re Probst, 2 Cir., 205 Fed. 512; Berry v. Midtown Service Corp., 2 Cir., 104 F.2d 107; In re Sixth & Wisconsin Tower, 7 Cir., 108 F.2d 538; Dakota Corp. v. Slope County, 8 Cir., 75 F.2d 584; and see United States v. Day, C.C.N.J., 6 Am. L. Reg. 632, 25 Fed. Cas. No. 14,934; In re Rice, C.C. Ala., 181 Fed. 217.

Berry depended, or in our decision in *Buskirk* or in those of the First, Seventh and Eighth Circuits.

The holding in *Lamb* v. *Cramer,* 285 U.S. 217, is of some comfort to the majority, but I find myself unable to accept it as an authoritative interpretation of a statute which the Supreme Court and the lower courts did not even mention.

Lamb was a lawyer, who, assertedly in payment of accrued legal fees, accepted a transfer of some of the property in litigation, upon which the adverse parties had specific liens. Concurrently, a supplemental bill in equity to require his restoration of the property to the custody of the court was filed and a rule issued against Lamb to show cause why he should not return the property to the custody of the court or be held in contempt. Lamb claimed immunity from service, and the district court upheld him in both cases. In both cases, the Court of Appeals for the Fifth Circuit reversed, holding that service upon Lamb was good, and that the supplemental bill in equity and the citation were each appropriate means to require restoration of the property to the control of the court, and that each means might be pursued concurrently.[4] Lamb appealed both cases to the Supreme Court, which affirmed the Fifth Circuit in each.[5]

Clearly, the only purpose of the citation in *Lamb* was the procurement of the return of property in the actual possession and under the control of the attorney, an officer of the court. It was not to punish him or to compel him to replace out of his own funds dissipated assets or money. The most significant thing about the *Lamb* cases, however, is that attention in both the Court of Appeals for the Fifth Cir-

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[4] Schmitt v. Lamb, 5 Cir., 48 F.2d 533 (the case arising from the supplemental bill in equity), and Cramer v. Lamb, 5 Cir., 48 F.2d 537 (the case arising upon the citation).

[5] Lamb v. Cramer, 285 U.S. 217 (the case arising on the citation) and Lamb v. Schmitt, Receiver, 285 U.S. 222 (the case arising upon the supplemental bill in equity).

cuit and the Supreme Court was focused upon a very different problem. In neither court was there a citation of the statute with which we are concerned or of the cases which had established a uniform interpretation of it. The Supreme Court wrote in *Lamb* v. *Cramer* as if the affront had been to itself. One can only suppose that it did so because the statute had not been called to its attention,[6] for the Supreme Court had made it perfectly clear in *Robinson*[7] that the subordinate, statutory federal courts are subject to the statute, and that their powers to punish contempts are effectively limited by it.

If the holding in Lamb may be regarded as an interpretation of the unmentioned statute, one may more reasonably conclude that it was an application of § 401 (2) rather than § 401 (3) with which, alone, we are concerned.[8]

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[6] It was of little moment in any event, for clearly the court had the power to compel the attorney to restore the property which he had taken with notice not only of the pendency of the proceeding, but with notice as well of the specific liens held by the adverse parties.

[7] Ex parte Robinson, 86 U.S. 505.

[8] It may be that Lamb did not seek protection of the statute because of ignorance of it. More probably, he did not because he thought the court's authority sufficiently clear under § 401 (2) to warrant his concentration of his defense in an attack upon the service of process. In either event, since, under the plain holdings of the relevant authorities at that time, the contempt proceeding was not arguably authorized by § 401 (3), but probably was authorized by § 401 (2), the Supreme Court's opinion, with no reference to either, cannot be construed as an authoritative construction of § 401 (3). There are too many reasonable explanations of the Supreme Court's action in that case to permit acceptance of the least likely and the most attenuated.

Twenty-four years after Lamb's case was decided, the Supreme Court held that an enrolled attorney was not an officer of the court within the meaning of § 401 (2), Cammer v. U.S., 350 U.S. 399, but that was not the prevailing notion when Lamb sought to retain the fruits of his malfeasance. See e.g. Ex parte Bradley, 74 U.S. 364, 374; Tanner v. U.S., 10 Cir., 62 Fed. 601; Ex parte Davis, C.C. Fla., 112 Fed. 139. If the explanation of Lamb's failure, and that of the courts which decided his case, to deal with the statute does not lie in an absence of awareness of it, speculation about the reason for ignoring it must be against a background of the law as it was understood at the time.

The large issue in thise case was the constitutionality of a continuing program of disbursement of tuition grants allegedly for the purpose of continued maintenance of segregated school systems. The payment of such tuition grants for one-half year did not abort the appeal or frustrate adjudication of the large issue. It was an unwarranted disbursement of public funds, but the Supervisors, themselves, are not now in possession of any part of those moneys. They are not officers of this court punishable under § 401 (2) for official transgressions. What is attempted here is far from what was accomplished in *Lamb* v. *Cramer,* and, to me, is inconsistent with an appropriate deference to an explicit congressional command of unquestioned constitutionality which limits our jurisdiction and authority.

I would not quibble with the majority's finding of fact that the conduct of the Supervisors was contemptible, but I do dissent from their conclusion that it was contemptuous and punishable as such, when the conclusion is dependent upon a reading of the statute which relegates it to meaninglessness. Such an unsympathetic construction is particularly inappropriate when the statute was clearly intended to inhibit our authority, has been declared by the Supreme Court to have that effect and has been uniformly construed by the courts of appeals in accordance with that evident intention. Such a statute limiting the jurisdiction of the federal courts is largely enforceable only by the limited courts, themselves. Above all other statutory commands, courts should be scrupulous to conform themselves to jurisdictional statutes, so that they do not appropriate to themselves powers which have been constitutionally withdrawn from them. If we exceed our authority, if we exercise powers we do not possess, the Supreme Court may correct us, but with the swelling volume of demand upon that court, the congressional scheme can be effectively and promptly implemented only

if the lower courts take great care to move only within the lawful boundaries of their authority.

Respectfully, I dissent from the conclusion that the Supervisors be held in contempt.

III

Judgment Order of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Board of Supervisors of Prince Edward County and the members thereof be, and they are hereby, held guilty of civil contempt; and that the said Board and its constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, be, and they are hereby, ordered jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions of August 4-5, 1964.

Further ordered that this cause be continued for a period of 90 days from this date for report by the Board and its members of what has been done towards compliance with this order, as well as for the passage of such further orders as may appear proper.

As to the amount allowed appellants' counsel as fees for their services in litigation leading to the reopening of the public schools of Prince Edward County, it is ordered that the United States District Court for the Eastern District of Virginia, reappraise the value of the legal services without

consideration of the reduction factor, consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

J. S. BELL
United States Circuit Judge

We dissent in part;

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

HERBERT S. BOREMAN
United States Circuit Judge

FILED
June 20, 1966

IV

Stay Order of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

Upon the petition of the appellees by their counsel, and for cause shown,

It is ordered that the execution of the order entered by this Court on June 20, 1966, insofar as it requires the defendants to make restitution of the monies therein mentioned, be, and it is hereby, stayed pending application of the appellees to the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court

within the time provided by law, but in all other respects the said order shall remain in full force and effect.

ALBERT V. BRYAN
United States Circuit Judge

FILED
July 29, 1966

V

Mandate of the Supreme Court of the United States

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Fourth Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the judgment of the United States District Court for the Eastern District of Virginia be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools, and that, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

And it is further ordered that the said petitioners, Cocheyse J. Griffin, etc., et al., recover from the County School Board of Prince Edward County, et al. Nine Hundred and Forty-three Dollars and Four Cents ($943.04) for their costs herein expended.

May 25, 1964

VI

Order on Mandate, filed June 17, 1964

The State Board of Education and the Superintendent of Public Instruction of the Commonwealth of Virginia have advised the Court in writing that they are prepared to cooperate to the fullest extent with the County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County in regard to the opening of public schools in said county beginning with the Fall Term, 1964, and are prepared to offer every service and assistance made available by them to any other locality in the Commonwealth, and that they have done and intend to do everything within their power to make available to the school and County Officials of Prince Edward County all State funds that are available to said County for public school purposes.

The County School Board of Prince Edward County and the Division Superintendent of Schools of said County have advised the Couny in writing that they have made tentative preparations for the opening and maintenance of public schools on a non-discriminatory basis beginning with the Fall Term, 1964, and that final preparations for the opening and maintenance of said schools will be completed as soon as they are advised by the Board of Supervisors of Prince Edward County and the State Board of Education and Superintendent of Public Instruction that the necessary funds have been appropriated for public school purposes.

The Board of Supervisors of Prince Edward County failed to advise the Court as directed on June 5, 1964, whether they have appropriated or intend to appropriate such funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County for

the school year beginning with the Fall Term, 1964. Instead, counsel for the Board of Supervisors advised the Court that no funds had been appropriated and that the Board of Supervisors does not intend to make such appropriation prior to the meeting scheduled with the Court on June 17, 1964. Counsel further advised the Court that the Board of Supervisors has held no formal meetings since the issuance of the mandate of the Supreme Court of the United States in the above-styled matter, and that the individual members of the Board of Supervisors, in order to reach a determination of the course of action which the Board should follow, requested advice from the Court with respect to numerous matters including a determination by the Court of the penalties which they (members of the Board of Supervisors) may expect to suffer in the event they find it impossible to comply with the requirements of the order of this Court.

Such prejudgment, being improper, is refused.

It appearing to the Court from the foregoing statements and from the hearing this day held that the State Board of Education, the Superintendent of Public Instruction, the County School Board of Prince Edward County, and the Division Superintendent of said County intend to fully comply with the mandate of the Supreme Court of the United States in re the opening of the public schools in Prince Edward County, Virginia, and that the Board of Supervisors of Prince Edward County, Virginia, does not intend to appropriate such County funds as are reasonably necessary for the opening and maintenance of the public schools in Prince Edward County on a non-discriminatory basis for the school year beginning with the Fall Term, 1964.

This Court, pursuant to the mandate of the Supreme Court of the United States, does hereby ORDER and DIRECT the members of the Board of Supervisors of Prince

Edward County, Virginia, acting as such, on or before June 25, 1964, to appropriate such County funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964; and if necessary to so do, the said members of the Board of Supervisors of Prince Edward County, acting as such, are directed to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination, the public school system in Prince Edward County like that operated in other counties in Virginia.

The injunction entered herein on November 16, 1961, and further extended on March 26, 1962, is herewith extended so long as the public schools of Prince Edward County, Virginia, remain closed.

The School Board of Prince Edward County, Virginia, and its Division Superintendent are directed to proceed with the preparation of the plans for the opening of the public schools in Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964, and to complete the same upon notification of the appropriation of funds for public school purposes. The duty of opening and maintaining the public schools of Prince Edward County, including the admission of all eligible pupils on a non-discriminatory basis, rests with the School Board of Prince Edward County, its Division Superintendent, the State Board of Education, and the Superintendent of Public Instruction of the Commonwealth of Virginia. The education afforded by the public schools of Prince Edward County should be substantially equal to that afforded by public schools in other parts of Virginia.

The Court denies the request for the entry of an order restraining the County School Board of Prince Edward County from employing teachers, principals and other supporting personnel on a non-discriminatory basis on the

ground the subject matter is clearly beyond the scope of the pleadings in this case.

Upon the assurances of the State Board of Education and the Superintendent of Public Instruction that they fully intend to cooperate in the reopening of the public schools in Prince Edward County, Virginia, and that they intend to do everything within their power to make available to the school and County officials of Prince Edward County all State funds that are available to said County for public school purposes, the request for an order enjoining the said State Board of Education and its Superintendent of Public Instruction from approving vouchers or warrants for the payment of money from State funds for various public school purposes to other counties and cities in the Commonwealth until the operation of public schools in Prince Edward County has been resumed will be denied.

Orders affecting other counties and cities of the Commonwealth will be deferred until such time as the Court is satisfied they are necessary to guarantee the reopening of the public schools in Prince Edward County in accordance with the mandate of the Supreme Court of the United States.

The Clerk is directed to furnish, and the United States Marshall is directed to serve, an attested copy of this order upon the members of the State Board of Education, the Board of Supervisors of Prince Edward County, Virginia, the County School Board of Prince Edward County, Virginia, and the other named defendants.

VII

Motion to Alter or Amend Judgment, filed June 29, 1964

Plaintiffs move the Court to alter or amend its judgment order entered herein on June 17, 1964, in the following particulars:

1. That the defendants be permanently enjoined and restrained from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school that discriminates in the admission and education of pupils on the basis of race and from paying or causing the payment of such scholarships to any such person for use at any such school.

2. That the defendants The County School Board of Prince Edward County and T. J. McIlwaine as Division Superintendent of Schools for said county and his successors in office be enjoined and restrained from employing or assigning teachers or other administrative and supporting personnel on a basis of race or color.

3. That the members of the County Board of Supervisors of Prince Edward County, acting as such, be ordered and directed forthwith to appropriate such county funds as are reasonably necessary for the opening and maintaining of the public schools of Prince Edward County for all of the children of said county of public school age on a racially nondiscriminatory basis.

/s/ HENRY L. MARSH, III
Of Counsel for Plaintiffs

VIII

Prayers of Motion for Further Relief, filed July 7, 1964

Plaintiffs move the Court to grant them further, necessary and proper relief and, in support of their motion say:

(A) That the defendant Board of Supervisors of Prince Edward County be enjoined and restrained from failing and refusing to appropriate from county funds and to make available to the County School Board of Prince Edward County a sum of money, to be expended for public school purposes, not less than $392,594.00 for the efficient mainte-

nance and operation of public schools of said county for the education of all of the children of school age in said county during the fiscal year 1964-65;

(B) That the defendant County School Board of Prince Edward County be enjoined and restrained from failing and refusing to operate schools sufficient for the education of all of the children of school age residing in said county during the 1964-65 school session without racial discrimination; and

(C) That the defendants the Board of Supervisors of Prince Edward County, Virginia N. Dearing as Treasurer of Prince Edward County, the State Board of Education, and Woodrow W. Wilkerson as Superintendent of Public Instruction, be enjoined and restrained from processing or approving any applications for state or county scholarships for the education of any child eligible to attend the public schools of Prince Edward County.

(D) That this cause be retained on the docket for such other relief as to the Court seems meet.

S. W. TUCKER
Of Counsel for the Plaintiffs

IX

Response to Motion to Alter and Amend Judgment and Report of the Board of Supervisors of Prince Edward County

The Board of Supervisors of Prince Edward County in response to the motion of the Plaintiffs that the Court alter and amend its judgment rendered herein on June 17, 1964, says:

1. The injunction prayed for in Paragraph 1 of the motion to alter and amend the judgment of the Court is the identical

injunction which the plaintiffs sought in the amended supplemental complaint heretofore filed in this Court.

The Court refused to grant the injunction as sought but granted an injunction restraining the payment of tuition grants to persons residing in Prince Edward County so long as public schools remain closed. The plaintiffs appealed this action of the Court in denying their prayer for the injunction here sought to the Court of Appeals. That Court likewise denied the injunction here sought. On certiorari to the Supreme Court of the United States error was again charged for failure of the lower court to grant this broad injunction. The Justice Department of the United States, speaking through the Solicitor General as amicus curiae, took the position that the Court should not authorize the issuance of the broad injunction here demanded but that the Court should limit the injunction of tuition grants only to such time as public schools remain closed in accordance with action of this Court in its final decree which was the subject of the appeal. The Supreme Court of the United States in its opinion and mandate did not authorize this Court to enter the injunction here prayed for but said: "The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since these grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia."

Since the question here raised was specifically before the Supreme Court in this very case between the identical parties and that Court refused to authorize an injunction against the tuition grants except "while public schools remain closed," it is submitted that this Court has exercised its full power in this respect when it limits its injunction against tuition grants as directed by the Supreme Court of the

United States. It is further submitted that the plainiffs having already litigated this question to a final judgment in the Supreme Court of the United States are bound thereby.

It is further submitted that the injunction here prayed for may not be granted in this suit because the constitutional freedom of parents and children would be denied without due process of law since parents and children nor any of them are before the Court in this case and their rights may not be thus impaired without full opportunity for a hearing.

2. The injunction prayed for under Paragraph 2 of the Motion may not be granted because neither the pleadings nor the evidence support the injunction nor is there before the Court in this case any person who asserts that he is denied any constitutional right with respect to employment in the public school system. The jurisdiction of the Court in this case is invoked for the redress of rights secured under the Constitution of the United States and the Court therefor does not have jurisdiction to grant this injunction under the pleadings and proof in the case.

3. The plaintiffs ask under Paragraph 3 that the Board of Supervisors of Prince Edward County be directed to appropriate funds for the operation of public schools for *all* of the children of Prince Edward County on a racially nondiscriminatory basis.

The Supreme Court of the United States directed and this Court in compliance therewith ordered the Board of Supervisors of Prince Edward County "to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." We do not understand that language to require that public schools be operated and maintained for children who do not attend public schools. Such a public school system certainly is not "like that

operated in other counties in Virginia." Such an order would be arbitrary and unreasonable exercise of power in violation of equitable principles and without benefit to any person whomsoever, and would extend beyond the authority and direction of the mandate of the Supreme Court of the United States in this case.

Report of the Board of Supervisors of its Action in Response to the Order entered on June 17, 1964

The Board of Supervisors of Prince Edward County in further response to Paragraph 3 of the motion to alter and amend the judgment of the Court reports its action under the order of this Court entered on June 17, 1964, as follows:

On June 23, 1964, this Board met in regular and public session and adopted two resolutions, levying taxes and appropriating funds derived therefrom to the School Board of Prince Edward County to be expended as directed in the said order. Certified copies of the resolutions aforesaid are attached hereto and are made a part hereof by reference. The Board of Supervisors of Prince Edward County asserts to the Court that it has acted in good faith in compliance with the order of the Court to provide local funds reasonable and adequate for the operation of public schools in Prince Edward County for all of the children who may be expected to attend said schools on a racially nondiscriminatory basis during the 1964-65 school year. The funds thus made available to the School Board of Prince Edward County are as follows:

Proceeds of County Levy and Appropriation	$189,000
Surplus in School Board Account	18,000
Misc. Income to the School Board	11,000
Basic State Aid	159,000
Special State Funds	41,200
Total Funds Certain	$418,200

The average cost of public education for the State of Virginia as a whole per pupil in average daily attendance for the year 1962-63 (the last year for which figures are available) was $312.40. The total funds available to the School Board of Prince Edward County results in an expenditure per pupil in average daily attendance of $288.41. The Board of Supervisors of Prince Edward County believes that this comparison demonstrates that it has made a reasonable and adequate appropriation to the School Board for the operation and maintenance of public schools for the year 1964-65. The appropriation made by the Board of Supervisors from local funds results in an expenditure per pupil in daily attendance from local funds of $131.00. If the entire anticipated enrollment of 1600 pupils is taken as the index for the per pupil expenditure of local funds, the figure is $118.00. There are seven counties comprising separate school divisions adjacent to Prince Edward County. The expenditure of local funds per pupil in average daily attendance for each of these counties during the year 1962-63 (the last year for which figures are available) was as follows:

Amelia	$ 92.00
Appomattox	121.00
Buckingham	83.00
Charlotte	84.00
Cumberland	68.00
Lunenburg	83.00
Nottoway	104.00

It is therefore respectfully submitted that the appropriation made by the Board of Supervisors in compliance with order of this Court entered on June 17, 1964, is reasonable and "adequate to reopen, operate, and maintain without

racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."

X

Order of District Court, filed July 9, 1964

This cause came on again this 9th day of July, 1964, to be heard upon the plaintiffs' motion to alter or amend the order entered herein on June 17, 1964; upon the response of the defendants; upon the plaintiffs' motion for an order enjoining and restraining the payment of State and County tuition grants for the 1963-64 school year; and argument of counsel.

It appearing to the Court that the defendants have announced the opening of the public schools effective September 8, 1964; that appropriations have been made for the maintenance and operation thereof and that the State and County school officials are proceeding with the taking of a school census and the completing of the necessary prerequisites incident to the opening of the public schools of Prince Edward County on a non-discriminatory basis, there is no justification for altering or amending its order of June 17, 1964. To do so would only hinder and delay the opening of the public schools of Prince Edward County.

Therefore, Paragraph No. 1 of plaintiffs' motion to alter or amend the judgment entered herein on June 17, 1964, is denied upon the ground the Supreme Court of the United States has not so ordered.

Paragraph No. 2 is denied upon the ground the subject matter is clearly beyond the scope of the pleadings in this case.

The order of June 17, 1964, clearly requires the admission of all eligible pupils on a non-discriminatory basis and

further amendment as requested in Paragraph No. 3 of the motion to alter or amend is denied.

Judge J. Spencer Bell of the United States Court of Appeals for the Fourth Circuit entered an order enjoining the defendants, pending an appeal, from processing or paying County and State tuition grants until the matter was heard in the District Court.

Said hearing having been held this day, and the defendants consenting to the entry of a permanent restraining order as requested;

The defendants, their agents, employees, successors in office, and all other persons acting for them, are herewith permanently enjoined and restrained from processing, approving or paying any County or State tuition grants to any person residing in Prince Edward County, Virginia, for the 1963-64 school year.

The plaintiffs this day tendered a motion for further relief, praying that the Board of Supervisors be required to appropriate not less than $392,594.00 for the maintenance and operation of the public schools of Prince Edward County; that the County School Board be required to operate schools sufficient for the education of all children of school age residing in the County; and that the defendants be enjoined from processing or approving any applications for State and County scholarships for the education of any child eligible to attend the public schools of Prince Edward County, Virginia.

The motion was marked "Filed" and denied without prejudice to the right of the plaintiffs to renew as to prayers A and B thereof after the opening of the public schools, if they be so advised, and without prejudice to instituting an appropriate suit as to prayer C, if they be so advised.

It is the duty of the members of the Board of Supervisors to appropriate such County funds as are reasonably neces-

sary to reopen, operate and maintain without racial discrimination, the public school system in Prince Edward County, Virginia, like that operated in other counties of Virginia. The duty of opening and maintaining the public schools of Prince Edward County, including the admission of all eligible pupils on a non-discriminatory basis, rests with the State and County school officials. The education offered should be substantially equal to that offered by public schools in other parts of Virginia.

This Court presumes the State and County officials involved will fully and completely perform their respective duties. It will not prejudge or hear motions alleging noncompliance with its orders except for good cause shown.

/s/ OREN R. LEWIS
United States District Judge

At Alexandria
July 9, 1964

XI

Notice of Appeal, filed July 17, 1964

Notice is hereby given that Cocheyse J. Griffin, Mignon D. Griffin, Naja D. Griffin, and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs in this case,

Hereby appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of this court entered July 9, 1964, as denies the relief sought by plaintiffs in their motion to alter or amend this court's judgment order of June 17, 1964, and in their motion for further relief filed on July 7, 1964, such relief as sought by the plaintiffs and denied by the court having been:

(1) An order restraining the defendants from processing or approving any applications for state or county scholar-

ships for the education of any child eligible to attend the public schools of Prince Edward County,

(2) An order restraining the defendants from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school which discriminates in the admission and education of pupils on the basis of race.

(3) An order directing the County Board of Supervisors to appropriate from county funds and make available to the County School Board a sum of money to be expended for public school purposes, not less than $392,544.00, for the efficient maintenance and operation of public schools for the education of all of the children of school age in said county during the fiscal year 1964-65,

(4) An order restraining the County School Board from failing to operate schools sufficient for the education of all of the children of school age residing in said county during the 1964-65 school session without racial discrimination, and

(5) An order restraining the County School Board and Division Superintendent from employing or assigning teachers or other administrative and supporting personnel on a basis of race or color.

S. W. TUCKER
Of Counsel for Plaintiffs

XII

Resolution of the Board of Supervisors of August 5, 1964

Whereas, by Ordinance of the Board of Supervisors of Prince Edward County, duly adopted at its regular meeting, July, 1960, in pursuance of Section 22-115.37 the Board of Supervisors was authorized to pay grants of $100.00 for each

child qualifying under the provisions of said Ordinance, such amount which might be increased by resolution of this Board adopted on or before the end of any fiscal year, and;

Whereas, in the opinion of this Board, such amount should be increased for the fiscal year 1964-65, now therefore;

On motion of Mr. Pickett, seconded by Mr. Steck, and unanimously carried, Be It Resolved that educational grants under the aforesaid ordinance be increased for all children meeting the qualifications as set forth in the aforesaid ordinance to $310.00 for each child attending a private non-sectarian high school (Grades 8-12) or a public high school, located outside the County of Prince Edward and $290.00 for each child attending a private non-sectarian elementary school (Grades 1-7) or a public elementary school, located outside the county, provided further that applications for such grants shall properly be made to the agent of the Board, and approved by this Board.

Be It Further Resolved, that such grants shall be paid one-half on or before September 1, 1964, and one-half on or before January 1, 1965.

XIII

Motion to Accelerate Appeal

Appellants move that this appeal be advanced on the docket and heard at a special session during which this Court will enter or direct the entry of such orders as will insure compliance with the Supreme Court's admonition in this case that quick and effective relief be fashioned to require the operation of a racially non-discriminatory public school system in Prince Edward County, Virginia.

Notwithstanding the objections and contentions of the plaintiffs as made in the District Court, the County Board of

Supervisors of Prince Edward County (the intransigence of which has been demonstrated beyond peradventure) is permitted to make its own arbitrary determination of the amount it will appropriate for public schools for the 1964-65 session. In the meantime, public authorities are free to pay public funds for scholarship grants to or for benefit of white children virtually all of whom will attend the racially exclusive schools of the Prince Edward Educational Foundation. The amount which the Board of Supervisors has appropriated for public schools is patently inappropriate for the efficient operation of public schools for the Negro children of the county alone.

Unless prompt action will be taken by this Court, thirteen years of litigation in which the plaintiffs have sought desegregation of public schools and five years of closed public schools will have been but a prelude to the establishment of two separate systems of schools maintained at public expense, the favored one of which will be for white children only and the other one of which will be an inadequately financed system attended only by Negroes and by such few, if any, white children who and whose parents may withstand the dissuading community pressure and publicly financed inducements to conform to the pattern of racially segregated public education to which the County Board of Supervisors continues to be committed.

On July 17, 1964, appellants filed their Notice of Appeal. Simultaneously with service of this motion, appellants serve designation of the record on appeal and designation of the parts of the record they propose to print.

S. W. TUCKER
Of Counsel for Appellants

XIV

Motion to Cite for Contempt

1. In accordance with the specific direction of this Court in this case, *sub nom, Allen* v. *County School Board of Prince Edward County,* 266 F.2d 507 (4th Cir. May 5, 1959), the United States District Court for the Eastern District of Virginia did, on April 22, 1960, ADJUDGE, ORDER and DECREE as follows:

> "That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees and successors in office, and all persons acting in concert with them, be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

2. "Having as early as 1956 resolved that they would not operate public schools 'wherein white and colored children are taught together' the [Board of] Supervisors of Prince Edward County refused to levy any school taxes for the 1959-1960 school year, explaining that they were 'confronted with a Court decree which required the admission of white and colored children to all the schools of the county without regard to race or color.' As a result, the county's public schools did not reopen in the fall of 1959 and have

remained closed ever since, although the public schools of every other county in Virginia have continued to operate under laws governing the State's public school system and to draw funds provided by the State for that purpose." (*Griffin* v. *County School Board of Prince Edward County, et al.*, . . . U.S. . . . , May 25, 1964.)

3. Pursuant to the Supreme Court's May 25, 1964, opinion in and remand of this case, the District Court by order entered June 17, 1964 did "ORDER and DIRECT the members of the Board of Supervisors of Prince Edward County, acting as such, on or before June 25, 1964, to appropriate such county funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964."

4. On July 17, 1964, the plaintiffs served and filed notice of their appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of the District Court entered July 9, 1964, as denies relief sought by the plaintiffs, including

(a) "An order restraining the defendants from processing or approving any applications for state or county scholarships for the education of any child eligible to attend the public schools of Prince Edward County,"

(b) "An order restraining the defendants from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school which discriminates in the admission and education of pupils on the basis of race," and

(c) "An order directing the County Board of Supervisors to appropriate from county funds and make available to the County School Board a sum of money to be expended for

public school purposes, not less than $392,544.00, for the efficient maintenance and operation of public schools for the education of all of the children of school age in said county during the fiscal year 1964-65."

5. On July 28, 1964, the plaintiffs served and filed their Motion to Accelerate Appeal wherein it is suggested "Unless prompt action will be taken by this Court, thirteen years of litigation in which the plaintiffs have sought desegregation of public schools and five years of closed public schools will have been but a prelude to the establishment of two separate systems of schools maintained at public expense, the favored one of which will be for white children only and the other one of which will be an inadequately financed system attended only by Negroes and by such few, if any, white children who and whose parents may withstand the dissuading community pressure and publicly financed inducements to conform to the pattern of racially segregated public education to which the County Board of Supervisors continues to be committed."

6. On August 4, 1964, this Court acting through its Clerk sought to obtain a stipulation that the defendants would not pay or cause payment of scholarship grants to persons residing in Prince Edward County until the issues raised by the appeal had been decided. Plaintiffs believe and allege that the Board of Supervisors of Prince Edward County and the members thereof had knowledge of the efforts to obtain such stipulation at the time they took the action next related.

7. At a special meeting held on the night of August 4, 1964, the Board of Supervisors of Prince Edward County decided to pay scholarship grants to parents of white children of elementary and high school grades residing in Prince Edward County, in sums aggregating approximately $180,-

000.00, and then the Board caused notice of such action to be given to the white parents who accordingly made applications for such grants; and such applications being forthwith processed, individual checks to said parents were written and delivered before 9:00 o'clock A.M. on August 5, 1964, with the result that checks for the major portion of said sum of $180,000.00 had been cashed before any of the Negro citizens of Prince Edward County had knowledge or means of knowledge that the August 4 meeting of the Board of Supervisors had occurred.

8. The calculated result of the August 4, 1964, action of the Board of Supervisors is that the parents who thus received public funds as scholarship grants will, under threat of criminal prosecution, pay such funds to the Prince Edward Educational Foundation, a corporation operating elementary and high schools in Prince Edward County for white children only.

9. Coupled with its earlier action of appropriating the grossly inadequate sum of $189,000.00 as the county's share for operation of public schools for 1600 Negro children while appropriating $375,000.00 for elementary and secondary education of 1300 white children in private nonsectarian schools, a further calculated result of the August 4, 1964, action of the Board of Supervisors is that the white children of the county with negligible exceptions will continue to attend the racially exclusive schools of the Prince Edward Educational Foundation at public expense.

10. The said action of the Board of Supervisors taken on August 4, 1964, was action calculated to continue the separation of the white and colored children in schools maintained and supported by money raised by public taxation and was in contempt of this Court's 1959 mandate that the District

Judge issue an order enjoining action that regulates or affects on the basis of color the public school education of Negro children, and thus constituted an obstruction to the administration of justice.

11. The said action of the Board of Supervisors taken on August 4, 1964, was action calculated to frustrate the exercise of the jurisdiction of this Court by placing the subject matter of the litigation beyond the reach of the Court before the plaintiffs' appeal could be heard and determined.

12. The said action of the Board of Supervisors taken on August 4, 1964, was action taken under color of law to willfully subject the plaintiffs and the class they represent to the deprivation of rights secured by the Constitution of the United States, in violation of 18 USC §242.

13. W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck, and H. E. Carwile, Jr., presently constitute the defendant Board of Supervisors of Prince Edward County, Virginia.

WHEREFORE: Plaintiffs move that a rule issue requiring W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., as the members of the defendant Board of Supervisors of Prince Edward County, Virginia, to appear before this Court at a time and place therein to be stated and to show cause, if any they can, why they should not be adjudged in contempt and punished therefor and why they should not be compelled to institute and prosecute proceedings against the Prince Edward Educational Foundation to recover from it so much of the money disbursed pursuant to the Board of Supervisors' action of August 4, 1964, as can be shown to have been paid to said Foundation or which may hereafter be paid to said Foundation, and to do and perform such other things for

the restoration of the subject matter and the protection of the rights of the plaintiffs as the Court may determine.

S. W. TUCKER
Of Counsel for Plaintiffs

XV

Reply of Members of the Board of Supervisors of Prince Edward County, Virginia, to a Motion to Cite for Contempt

The members of the Board of Supervisors of Prince Edward County respectfully state to the court as follows:

1. They have acted in good faith and with appropriate respect for the Constitution of the United States, for the Federal Courts, and for all others in authority.

2. At no time have they taken any action which they have understood to be in violation of any order of any court or to be in contempt of the jurisdiction of any court in this case.

3. It is true that they refused to levy taxes upon the people of Prince Edward County for the operation of public schools during the years 1959-60, 1960-61, 1961-62, 1962-63 and 1963-64.

4. The legal basis upon which their action was predicated was considered in the District Court, in this court, and in the Supreme Court of the United States. Neither the District Court nor this court entered any order or rendered any opinion holding that the Board of Supervisors of Prince Edward County were required to levy taxes for the operation of public schools. The Supreme Court of Appeals of Virginia affirmatively held that they did have such a right under the law of Virginia, and that the failure to levy such taxes did not violate the Constitution of the United States.

5. On May 25, 1964 the Supreme Court of the United States held that under the Constitution of the United States the public schools of Prince Edward County could not be closed while public schools were operated in other counties and cities in Virginia and by its mandate directed the Judge of the District Court to require this Board to appropriate such county funds "as are reasonably necessary for the opening and maintenance of public schools of Prince Edward County on a non-discriminatory basis beginning with the fall term 1964."

6. On June 17, 1964 the District Court entered such an order and on June 23, 1964 this Board made a tax levy in accordance with said order and appropriated the proceeds thereof, $189,000.00, to the School Board for the operation of public schools in accordance with the order of the Court.

7. At the time the appropriation was made it was wholly uncertain as to how many children would attend the public schools of Prince Edward County. This Board believed the amount appropriated was reasonable and sufficient to operate the public schools in accordance with the requirement of the laws of the State of Virginia and in accordance with the requirement of the order entered in the District Court on June 17, 1964.

8. By affidavit filed by the Superintendent of Schools of Prince Edward County it now appears that an additional sum of $66,747.00 may be required for the operation of the said schools for the entire school term. It is the intention of the Board of Supervisors of Prince Edward County to provide those funds in event they are not forthcoming from some other source, and in all events it is the intention of this Board to do what is reasonable and appropriate to fulfill the obligations imposed upon it in the order of the United States District Court of June 17, 1964.

9. This Board has appropriated during each year beginning with the year 1959-60 a sum of money for the payment of scholarships for the education of children resident of Prince Edward County and the appropriation of $375,000.00 for that purpose on June 23, 1964 was simply a reappropriation of the identical sum which was appropriated for that purpose the previous year.

10. The money appropriated for scholarships is the proceeds of taxes which had been levied for that purpose only and not for public schools.

11. On August 4, 1964 this Board was requested by its Special Counsel to stipulate that it would make no payments for scholarships for the education of children residing in Prince Edward County in non-sectarian private schools until this appeal was decided. The Board refused to make such a stipulation for the reason that it would be wholly misunderstood by the people of the county. This Board is advised that those who had contacted Special Counsel of the Board were advised of the refusal of the Board to so stipulate.

12. On the morning of August 5, 1964 the Board of Supervisors met and adopted a resolution that checks in payment of the amount of money authorized by the said resolution and in pursuance of a County Ordinance, a copy of which is found, were issued, the total thereof being approximately $178,000.00.

13. That at the time this action was taken this Board was of the opinion that the action was authorized by the decision of the Supreme Court of the United States and under the order of June 17, 1964, since all action had been taken by all agencies responsible to open, maintain and operate the public schools in Prince Edward County.

14. This Board was further advised that it was under no order which prevented it from taking the action above referred to and it disavows any intention on its part to be disrespectful or to disregard any court or its jurisdiction, and was of the opinion that the action taken was within its lawful right.

15. This Board further states that the amount paid under the resolution aforesaid was $145.00 for elementary children and $155.00 for high school children. When it was brought to the attention of this Board that the amount of money authorized by the resolution, when added to the amount which might be available to parents under the State law, might exceed the amount of the actual cost of education, although this Board is of the opinion that both the county ordinance and the State law forbid a parent to apply for or to receive a sum in excess of the amount actually paid for the education of the child, it, nonetheless, adopted a resolution modifying and amending its former resolution so as to guarantee the fact that no parent would receive a sum of money in excess of the actual cost of education of the child.

The members of this Board aver their good faith and deny that they have acted in violation of any order of this Court and pray that the motion to cite them for contempt be dismissed.

XVI

District Court Order of May 17, 1965

"ORDER ON FINDINGS

"This cause came on again the 23rd day of April, 1965 for further inquiry into the facts surrounding the (tuition grant) payments made August 4-5, 1964; for hearing upon the order entered February 8, 1965 directing that W. W. Vaughan, C. W. Gates, H. M.

Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., show cause, if any they could, why they should not be held in contempt of this Court for failure to comply with its order entered herein on the 9th day of July, 1964; and for hearing upon plaintiffs' motion for an award of counsel fees.

"All motions were consolidated for hearing.

"The members of the Board of Supervisors appeared in person and by counsel. All parties in interest were fully heard and given the opportunity of presenting such evidence and introducing such exhibits as they deemed pertinent to the motions under consideration.

"From the testimony and exhibits thus produced the Court finds that:

"The appellants filed a motion to accelerate their appeal (in re the payment of these tuition grants) to the Fourth Circuit on or about July 28, 1964.

"Mr. Frederick T. Gray, of counsel for the Superintendent of Public Instruction of Virginia, chanced to see Maurice Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, at or near Tenth and Main Streets in Richmond on or about July 31, 1964, at which time Mr. Dean mentioned that Mr. Gray would very likely be back before the Court of Appeals since a motion to accelerate the appeal in the Prince Edward school case was in the offing.

"Shortly thereafter Mr. Dean told Mr. Gray that Chief Judge Haynsworth wanted to know whether or not it was possible to get a stipulation from the State and County authorities that the tuition grant payments would not be paid pending the hearing on the appeal.

"Mr. Gray immediately advised the Attorney General and counsel for the Board of Supervisors of this request. He was then informed that the Board of Supervisors would not agree to enter into the suggested stipulation. Mr. Dean was so told during the late evening of August 4, 1964.

"Mr. Dean again called Mr. Gray the following morning informing him that the stipulation desired was not that the tuition grants would not be paid until this case had been decided but rather that the grants would not be paid prior to the normal date for the processing and payment of the grants.

"While Mr. Gray was relaying this information to the Attorney General, he received a telephone call from the Commonwealth Attorney of Prince Edward County advising him that during the night of August 4, 1964 the Board of Supervisors had authorized the payment of the tuition grants and that the grants had in fact been made and actually paid to the citizens on the morning of August 5th. This took the State officials by complete surpise as there had been no discussion between the State and County officials concerning advancing the date for the payment of the grants.

"Mr. Gray then called Mr. Dean and told him the grants had been paid that morning.

"The Board of Supervisors of Prince Edward County held a meeting on the morning of August 4, 1964 at which time Warren Scott and four of the Negro citizens appeared and filed an unsigned petition bearing ten hundred four typewritten names requesting that the Board of Supervisors allocate additional funds to be used for the purpose of public education. No action was then taken.

"Shortly after adjournment of the Board meeting, Supervisor Jenkins and Supervisor Steck met with a Mr. Taylor and other interested citizens for the purpose of finding a way to pay the '64-'65 tuition grants prior to the time the Court of Appeals could enter an order staying these payments. (It was then known to Mr. Jenkins and to the other members of the group that there had been discussions between Mr. Gray and Mr. Dean in re the possibility of the County agreeing not

to make any tuition grant payments during the pendency of the appeal.)

"The Commonwealth Attorney and two other members of the Board of Supervisors were then called. Those assembled agreed that if the Board of Supervisors would increase the tuition grants to $310.00 for high school and $290.00 for elementary school and authorize the immediate payment thereof, this could be done before the Court of Appeals could do anything about it.

"The four Board members and the Commonwealth Attorney then went to the home of the chairman of the Board of Supervisors to advise him of what they had in mind and to determine whether or not a special meeting of the Board of Supervisors could be called the next morning for the purpose of expediting the payment of the '64-'65 tuition grants. The chairman, after being advised by the Board's special counsel and the Commonwealth Attorney that such a resolution on the part of the Board of Supervisors would be legal, called a special meeting of the Board for 8:00 a.m. August 5th. At that meeting the Board passed the resolution which provided that the grants should be paid half on or before September 1, 1964 and half on or before January 1, 1965.

"In the interim, that is, between the meeting at Chairman Vaughan's house and eight o'clock the next morning, Board Member Jenkins and other members of the citizens' committee made arrangements to telephone the parents of the children then attending the Prince Edward School Foundation schools advising them if they came down that night and made application they could get half the tuition money that morning.

"Some twenty or thirty volunteers assisted the secretary of the Board in processing the applications and making out the necessary checks. County bonds were sold in Richmond the next morning to raise the money necessary for the payment of these checks.

"Twelve hundred seventeen tuition grant applications were filed during the night of August 4-5. All of these applications were for the '64-'65 school year. Each applicant was paid one-half of the amount applied for. Most, if not all, of the applicants were children enrolled in the Prince Edward School Foundation schools for the year '64-'65.

"There being no evidence that the money thus paid covered school years prior to '64-'65, the Court concludes that the payments made August 4-5, 1964 were not violative of the order entered herein July 9, 1964 The show cause order issued against the members of the Board of Supervisors February 8, 1965 will be dismissed, and it is SO ORDERED.